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Brief for Appellant

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Supreme Court

OF THE

United States

October Term, 1907

ALLEN R. ENGLISH and HONORA, His Wife, Appellants,

vs.

THE TERRITORY OF ARIZONA, at the relation and to the use of JOHN W. BOGAN, Treasurer and Ex-Officio Tax Collector in and for the County of Pima, in the Territory of Arizona, Appellee.

No. 454.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Brief for Appellant.

STATEMENT OF THE CASE.

On and prior to June 19th, 1903, a petition for the condemnation of all private property in Block No. 206 of the City of Tucson, in the County of Pima, Territory of Arizona, a small wedge block

bounded on the South by Congress Street, on the North by a street called Maiden Lane, on the East by Church Street, and on the West by Court Street, for the purpose of widening Congress Street to and including Maiden Lane, was pending before the Mayor and Common Council of the said City of Tucson; and on that day the appellant, Allen R. English, by his attorney-in-fact, R. Ford, signed said petition, with two others, and thereby the said petition became the petition of a majority of the owners of the lineal frontage on said Block No. 206 (Printed Record page 109), and thereupon the Common Council passed City Ordinance No. 168 for the condemnation of said block for the purpose of widening Congress Street to and including Maiden Lane, (Printed Record page 67).

And thereupon the City brought an action in the District Court of said Pima County, No. 3409, against the owners, occupants and lessees of said Block No. 206, Lizzie J. Woods et al., and procured a judgment of said Court, condemning all private property rights in said block, for an easement to widen Congress Street, as in the said ordinance No. 168 set out, and assessing the damages at $45,000.00; and afterwards, on a supplemental petition, appointed three commissioners, John W. Bogan, James Flynn and H. H. Pilling, to assess the property benefited by said improvement, and providing: "That no lot, block, tract or parcel of land shall be assessed at a greater amount than it shall be actually benefited (Record pages 75 to 85).

And the commissioners met on December 8th, 1903, three days after the order of appointment, and adjourned to December 14th, and ordered notice given to all persons that a hearing would be had

before said commission on the 24th day of December, 1903, at the City Hall, etc.

The commission met again on December 15th, 1903, at which it was agreed: "That the North side of Maiden Lane, between Court and Church Streets, should be fifty per cent of the entire assessment, and the South side of Congress Street, between Church and Court Streets, should be twenty-five per cent of the entire assessment, and that the adjacent property benefited, including the City of Tucson, should be the balance, and the Clerk of the committee was instructed, by and with the advice of the committee, to prepare an assessment roll, showing the benefit to the property as aforesaid," (Record printed page 87).

And on the 24th day of December, 1903, the committee met and proceeded as follows:

"Committee, J. W. Bogan, H. H. Pilling and James ————. The meeting was called to order at 2:15 p. m. by Chairman Bogan.

Chairman: The first name on the assessment list is A. R. English, Lot 5, Block 197, $12,533.75. Mr. Hereford, representing Mr. English, stated that there were several matters on which he would like to have an understanding.

First, he wanted to know if the assessment was based on the theory that the property lying south of that of Mr. English, between the English property and Congress Street, would go to Mr. English, to which the chairman answered, 'Yes.'

Chairman: The next on the roll is C. F. Shumacher, Lot 4, Block 197, $4,999.50. Mr. Shumacher asked on what basis the committee made the assessment and was answered by Mr. Houghton,

Clerk, that it was made on the basis of $75.00 per foot front." (Printed Record page 87 at bottom).

And the committee proceeded to call the roll and make the assessment list as set out in full on pages 88 to 95, both inclusive, of the record.

The committee met again on December 28th, 1903, and made report with copy of the corrected assessment to the Mayor and Common Council of Tucson (Record pages 96-97-98 and 99).

And the Common Council met on December 30th, 1903, and passed resolution No. 100, confirming the said report and assessment roll, (Record page 103).

And thereafter on the 13th of February, 1904, the Common Council passed Ordinance No. 181, Plaintiff's Exhibit B, entitled: "Providing for the collection of assessments to remove Block 206 of the City of Tucson and for the issuance of bonds therefor", which, after reciting the proceedings had in the matter of the removal of said block as hereinbefore set out, provided for the issue of bonds of the City to pay for any assessments not immediately collected as per Par ——, Sec. —— ,of Chapter 2, Title II, Revised Statutes, and fixing the interest of said bonds at 7 per cent per annum, and making the payments due on February 15th, 1904, (Record pages 9-10-11-12 and 13).

And on February 15th, 1904, the Mayor of the said City of Tucson issued to James Flynn, Tax Collector, his warrant (Plaintiff's Exhibit C) in the words and figures following, to-wit:

"Warrant for the Collection of Special Assessment and Taxes.

To James Flynn, Esq., Collector of Taxes in and for the City of Tucson, Pima County, Arizona, Greeting:

You are hereby authorized and directed according to law and the ordinances of the City of Tucson, particularly Ordinance No. 168, entitled, 'Providing for widening Congress Street between Church Street and Court Street, in the City of Tucson, Arizona, by the removal of Block No. 206', which said ordinance was passed and adopted and duly approved on the 19th day of June, 1903, to collect within thirty days from the date of receipt of this warrant by you, in manner and form as hereinafter specified, all and singular the special assessment and taxes levied against all and singular those parcels of land, with the improvements thereon, to be benefited by the widening of Congress Street, as contemplated by said ordinance, all of which said properties are respectively set forth, designated and described, together with the names of the owners thereof,in the amended and modified assessment roll of the Special Assessment Committee appointed by the District Court of the First Judicial District, Territory of Arizona, in and for Pima County, filed December 5, 1903, and adopted by the Mayor and Common Council of the City of Tucson, December 30, 1903, a copy of which said amended assessment roll, as confirmed by the Common Council, is herewith delivered.

You will therefore proceed forthwith, according to law and the said ordinance, to make collection of the said special assessments and taxes, and as hereinafter particularly described, and all moneys so collected by you, you will at once pay over to the Treasurer of the City of Tucson, taking the receipt of the said Treasurer therefor. You will

make all and singular of the said collections as hereinafter specified, so far as possible, within thirty days from the date of receipt by you of this warrant, and in case you shall fail to collect any of the said special assessments so assessed and levied, you will report the same to the Mayor and Common Council of the City of Tucson at the expiration of thirty days of the receipt by you of this warrant.

You will further take notice that the said special assessments are to become due and payable in five equal annual installments, the first installment to be due and payable within thirty days from the date of this warrant as aforesaid, the balance of the installments to become due and payable in five equal annual installments each year thereafter, and as provided in Ordinance No. 181 of the said City of Tucson, passed and adopted on the 13th day of February, 1904. Deferred installments are to bear seven (7) per cent interest which you will also collect at the times and dates as they become due.

You are further notified that within thirty days from the date of these presents any party assessed may pay the entire amount of his assessment, and thus be relieved from paying the annual installments and interest thereon. From and after the thirty days from the date of this warrant you will not extend the privilege of paying the entire assessment to any one, but their said assessments must be paid in installments as herein provided.

Hereof fail not.

Done in the City of Tucson this 15th day of February, 1904.

C. F. SCHUMACHER, Mayor.

Attest: FRANK S. TREAT,
Recorder and Ex-Officio City Clerk."

with a copy of the modified and corrected assessment, hereinbefore mentioned, attached (Record pages 13-14-15 and 16), and on the same day the said Tax Collector published notice, Plaintiff's Exhibit D, as follows:

"SPECIAL ASSESSMENT NOTICE.

"Notice is hereby given that the Common Council of the City of Tucson, in Pima County, Territory of Arizona, have levied and assessed a special assessment on the property benefited by the following improvements, namely: The altering and widening of Congress Street between Church Street and Court Street, in said City of Tucson, by the removal of Block 206, as will more fully appear from the assessment roll for such special assessment on file in the office of the City Recorder of said City; and a warrant for the collection of such assessment is now in the hands of the undersigned. All persons interested are hereby notified to call and pay the amounts assessed, at the Collector's office in the City Hall, at the corner of Court and Library Streets, in the City of Tucson, within thirty days from date hereof. The amounts assessed against parties interested are due in five annual installments of equal amounts each, deferred installments to bear interest at the rate of seven (7) per cent per annum. All parties interested are at liberty, within the thirty days herein specified, to pay the total amount of the assessments against them and thus avoid interest on deferred installments. This privilege is not to be granted from and after the said thirty days. The failure to pay any installment of said assessment when due shall make the entire assessment payable.

Dated this 15th day of February, 1904.

JAMES FLYNN, Collector."

And thereafter, on the 9th day of April, 1904, the said Tax Collector brought suit in the District Court of Pima County, No. 3521, in the name of the City of Tucson, at his relation, against Allen R. English and wife, and several others for the collection of the same assessment for the removal of Block 206, in which Allen R. English and wife were charged with the same assessment, $12,533.75. (See answer of English and wife, Record page 18, paragraph II, and certificate of Clerk, Record page 124).

And after that suit commenced on July 5th, 1904, the Mayor and Common Council of the City of Tucson passed Resolution No. 108, in the words and figures following, to-wit:

"RESOLUTION NO. 108.

Be it resolved by the Mayor and Common Council of the City of Tucson, as follows:

Whereas, Heretofore and on to-wit, the 19th day of June, 1903, the Mayor and Common Council of the City of Tucson, by their Ordinance No. 168, provided for altering and widening Congress Street between Church Street and Court Street in said city, by special assessment of adjacent property benefited; and

Whereas, said Ordinance contemplated the entire removal of Block No. 206 in said city, and when removed it was the expressed purpose and intention that the part of Maiden Lane lying between Church Street and Court Street should be vacated and should become a part of the property abutting thereon the north; and,

Whereas, acting on such expressed agreement the committee appointed to estimate the benefits to

adjacent property assessed about one-half of the entire cost of the removal of said block 206 to the properties directly fronting on the north side of Maiden Lane between Church Street and Court Street, to-wit, upon Lots 3, 4 and 5 in Block No. 197; and,

Whereas, The said Block No. 206 has now been removed and a new map of said Block No. 197, in the City of Tucson, has been prepared by the City Engineer and adopted by the Mayor and Common Council on the 5th day of July, 1904, which said map shows the portion of Maiden Lane to be vacated as a street, and also the property to be added to the lots abutting on Maiden Lane on the north by reason of the vacation of that portion of Maiden Lane sufficient to make Congress Street of a uniform width of eighty feet throughout its entire length; therefore,

Be it Resolved, That that portion of Maiden Lane shown upon the said map, so approved and adopted as aforesaid, be and the same is hereby vacated, and the same shall become a part of the lots abutting on Maiden Lane to the north, to-wit: Lots Nos. 3, 4 and 5 in Block No. 197, and in the proportion which it should justly bear to such lots, and as shown specifically by metes and bounds on said map; provided, however, and this resolution is upon the expressed understanding, that the assessments levied upon the said lots 3, 4 and 5 are paid, and said vacated portion of said Maiden Lane is not to become a part of any of said lot or lots, or to be added thereto, until the assessment upon such lot or lots is paid in full, and when so paid this resolution as to the lot or lots upon which the assessment is paid is to be in immediate force and effect.

Be it further resolved, That the City Clerk and Recorder of the City of Tucson is hereby required

to record a certified copy of this resolution, together with a certified copy of said map of Block No. 197, with the City Recorder of Pima County, Territory of Arizona.

Passed and adopted by the Mayor and Common Council this 5th day of July, 1904.

FRANK S. TREAT, City Clerk.

Approved this 5th day of July, 1904.

C. F. SCHUMACHER, Mayor."

And about a year thereafter (the exact date not appearing from the record, but a short time before April 25th, 1905) this action was commenced in the same Court, to collect the same assessment in the name of the Territory of Arizona, at the relation and to the use of John W. Bogan, Treasurer and Ex-Officio Tax Collector of the County of Pima.

The complaint in this action, with its Exhibits A, B, C and D, from which we have hereinbefore copied, appears on pages 1 to 16 inclusive of the Record; and in the first fourteen paragraphs, pages 1 to 5, states a cause of action in favor of the City of Tucson and against English and wife, and in the next nine paragraphs, XV to XXIII, pages 5 to 8, states the cause why this action is brought by the said relator John W. Bogan.

The appellants, Allen R. English and wife, defendants in the suit answered said complaint. This answer is contained on pages 18 to 26, both inclusive, of the record; and pleads the action then pending of the City of Tucson at the relation of James Flynn, Tax Collector against the said English and wife, for the same special assessments. (Record page 18.)

And again sets up a plea of another action pending. (Record page 19.)

And defendants made further answer in seventeen paragraphs on pages 19 to 26 both inclusive of the record, making many admissions, denials and averments, among which they denied:

"That the Territory of Arizona had any lien whatever against the property of these defendants, or any of the same, for or on account of the assessment referred to in the complaint herein or otherwise. (Record Par. XIV, page 24.)

And alleged upon information and belief:

"That the improvements referred to in the complaint and involved in this action, were made without the appointment by the City Council of three of its members or other persons to make an examination of the premises to be affected, and to make an estimate of the cost of the improvement contemplated by said ordinance No. 168"; and allege: "That no committee appointed by said Council for such purpose ever examined the premises to be affected by said improvements as required by Sections 7 and 8 of Act No. 52 of the 19th Assembly of the Territory of Arizona". (Record page 25, Paragraph XV-XVI.)

And allege: "That in addition to the arbitrary mathematical assessment hereinbefore referred to, the said commissioners included as a part of the assessments of the property of defendants the alleged value to defendants of a portion of the public highway then existing in the City of Tucson, and known as Maiden Lane, which adjoins the property of these defendants, and which was not included in Congress Street as altered and widened in the

course of improvements actually made and which are involved herein, which the said City of Tucson proposed to deed to these defendants upon the payment of the said proposed assessments against them."

All these denials and allegations were verified by Allen R. English. (Record pages 25 and 26, Paragraphs XVII-XVIII)

To this answer plaintiffs replied by an enlargement of the complaint and a general denial of each and every allegation of the new matter contained in the answer. (Record pages 26 to 30.)

On these pleadings the case was tried and thereafter the trial court made its Findings of Fact, which were adopted in full by the Supreme Court as the statement of facts on appeal, (Record pages 127 to 134) and therefrom made Conclusions of Law and Judgment, (Record, pages 37 to 40).

II.

ASSIGNMENTS OF ERROR.

I.

The Court erred in overruling defendant's pleas of another action pending, (Record, page 18, Par. 2, and page 60, line 10 from top of page).

II.

The Court erred in refusing to make Finding of Fact No. 3 as requested by defendant. (See defendants' requests, Record, page 31.)

III.

The Court erred in refusing to make the Findings of Fact numbered 19, 20 and 21 as requested by defendants, (See defendants' requests, Record, page 35).

IV.

The Court erred in refusing to make Finding of Fact, No. 26, as requested by defendants, (Record, page 36).

V.

The Court erred in making Finding of Fact, Nos. 20 and 23, (Record, pages 133-134).

VI.

The Court erred in making its conclusions of law numbered 9, 10, 11 and 12, (Record, page 39).

VII.

The Court erred in rendering judgment for plaintiff, (Record, pages 39-40).

III.

AUTHORITIES AND ARGUMENT.

FIRST ASSIGNMENT.

The Court erred in overruling defendants' pleas of another action pending. (Record, pages 18 and 60).

We admit that, technically considered, these pleas were defective; but they were quite sufficient to put the Court on notice that this suit was not brought in the name of the REAL PARTY IN INTEREST, as will hereafter more fully appear.

SECOND ASSIGNMENT.

The Court erred in refusing to make defendants' requested Finding of Fact No. 3.

That said petition, (petition for the removal of all private property on Block 206) contained the statement:

"That the land embraced therein be thrown open as a street and thoroughfare, and that all such land between Congress Street, the North side of Maiden Lane, the West side of North Church street, and the East side of Court Street be made into one Street which shall be known as Congress Street", because this is the exact meaning of the PETITION signed by the appellant English and others. (See Record, pages 109-110.)

THIRD ASSIGNMENT.

The Court erred in refusing to make defendants' Finding No. 19: That the City Council did not appoint any committee * * * to make estimate of the costs of the contemplated improvement, as required by Paragraph 471 (Sec. 7) of the Revised Statutes of Arizona, which reads as follows:

"The common council shall appoint three (3) of its members or any three (3) competent persons, who shall make an examination of the premises to be affected and make an estimate of the cost of the

improvements contemplated by such ordinance, including labor materials and all other expenses attending the same, and cost of making and levying the assessment, and shall report the same in writing to said common council."

Because said paragraph is mandatory and such committee should be appointed and then report made before the assessing committee provided for in the next paragraph, No. 472, can be appointed; and there is no proof in the record that any such committee was ever appointed or ever did report, (Record, page 35, and testimony of Frank S. Treat, City Clerk, Record, pages 57 and 58).

FOURTH ASSIGNMENT.

The Court erred in refusing to make requested Finding No. 26:

"That no notice was ever given of the time at which application would be made for the confirmation of the assessment herein involved, or of the time when the same was actually had or made". (Record, page 36.)

It may be that, by paragraphs 478, (Sec. 14) and 479 (Sec. 15), and the practice of this Court, we are estopped from raising any of the objections hereinbefore set out, as appellants did not appeal from the order of the City Council of December 30th, 1903, confirming the assessment; but we submit that appellants had no notice of the time when said confirmation would be made, either before said confirmation or within the twenty days allowed for appeal; and the testimony of City Attorney John B. Wright, of conversations with Mr. English, was of conversations had after the confirmation and

when Mr. Wright was trying to sell the city bonds. (See testimony of Jno. B. Wright, Record, pages 55 to 58.)

FIFTH, SIXTH AND SEVENTH ASSIGNMENTS.

These three assignments of error each goes to the gist of this action, and we will now discuss them together.

FIFTH ASSIGNMENT.

Findings of Fact Nos. 20 and 23 are in direct contradiction to Findings No. 1 to 19 inclusive, because these findings state a cause of action in favor of the City of Tucson, and not in favor of the Territory of Arizona or of the relator, John W. Bogan, Treasurer and Ex-Officio Tax Collector, etc., and findings 20 and 23 are not sustained by any evidence.

SIXTH AND SEVENTH ASSIGNMENTS.

The Conclusions of Law, Nos. 9-10-11 and 12 (Record, page 39), and the judgment (Record, pages 39 and 40) are not sustained by the Findings of Fact, because the findings of fact all, excepting Findings Nos. 20 and 23, plainly state a cause of action in favor of the City of Tucson, for special municipal assessments.

It appears plainly from the complaint and the Findings of Fact, Nos. 1 to 19 inclusive, that this suit was brought to recover special municipal assessments, as authorized to be made by Chapter 2, Title XI, of the Revised Statutes of Arizona of 1901, and plainly the action is not prosecuted in

the name of the real party in interest. Paragraph No. 1299 (Sec. 90) of the Revised Statutes of Arizona of 1901, reads as follows:

"1299 (Sec. 90): Every action shall be prosecuted in the name of the real party in interest: Provided, An executor or administrator, or a trustee of an express trust or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is brought".

But the contention of the appellee is that Paragraph No. 488 (Sec. 24) of the Revised Statutes of Arizona of 1901, authorizes the County Collector of Territorial and County taxes to maintain this action in the name of the Territory and to recover the extraordinary interest, penalties and fees as provided for in actions for the collection of delinquent Territorial and County taxes. Taxes, by Act No. 92 of the Session Laws of 1903, 22nd Session, which we will hereafter show, cannot be construed to have any application to suits for the collection of municipal special assessments. Said paragraph No. 488 reads as follows, to-wit:

"488 Sec. 24): The General Revenue Laws of this Territory in reference to proceedings for the collection of delinquent taxes on real property, the sale thereof, the execution of certificates of sale and deeds thereon, the force and effect of such deeds and sales; and all other laws in relation to the enforcement and collection of delinquent taxes and redemption of tax sales, except as herein otherwise provided, shall be applicable to proceedings to collect such special assessments."

But we contend that, to so construe that paragraph, it is necessary to add thereto words of the following import:

"And the County Collector of Territorial and County taxes is hereby expressly authorized to sue in the name of the Territory for such special assessments and in such suits to recover the same interest, penalties and fees as are now or may hereafter be allowed by law in suits for the recovery of delinquent Territorial and County taxes."

But to further show that such construction of Paragraph 488 (Sec. 24) above quoted and of Chapter II of Title XI of the Revised Statutes of Arizona of 1901, of which said paragraph is a part, is not only unwarranted in law, but is also contrary to the plainly expressed intention of the Legislature at the time the same was originally enacted, we copy here, side by side, the two original acts of the Legislature, to-wit: Act No. 57 of the Session Laws of 1897, and Act No. 66 of the Session Laws of 1899, amending the said act No. 57 of the Session Laws of 1897, from which chapter 2 of Title 11 of the Revised Statutes of 1901 was copied in full, and we prefix the paragraph number of the Revised Statutes to each section:

1897.

"No. 57 AN ACT.

Adding to the Powers and Privileges already Vested by Charter in Incorporated Cities.

Be it Enacted by the Legislative Assembly of the Territory of Arizona:

Par. 465, R. S.

SEC. 1. That in addition to the powers already vested in Cities of this Territory by their respective charters and the general laws of this Ter-

ritory Cities and Common Councils in Cities shall have the following powers:

First. To lay out and establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, side-walks, parks and public grounds, and vacate the same.

(Sub-sections second to twenty-eight, both inclusive, grant general police powers, but nothing in these sub-sections or in any of them is material in this case, and we therefore omit them.)

Par. 466, R. S.

SEC. 2. When any city shall by ordinance provide for the making of any local improvement, it shall by the same ordinance prescribe whether the same shall be made by special assessment, or by taxation of contiguous property, or general taxation or both. But no such improvements shall be made or ordered made by special assessment or taxation of contiguous property in the first instance, unless a petition for the making of such improvement, signed by the owners of a majority of the lineal frontage upon such improvement shall have first been filed with the City Recorder, but this restriction shall not be applicable to, nor limit the Common Council in making and ordering any and all repairs on such improvements, after the same have once been made.

Par. 467 R. S.

Sec. 3. Should said ordinance provide for improvements which require the taking or damaging of property, the proceedings for making just compensation therefor

shall be the same as provided in Title 22, Revised Statutes of this Territory. (Meaning Title 21 of Eminent Domain, as corrected by Act. No. 90 of 1903.)

Par. 468 R. S.

Sec. 4. When the ordinance under which said improvement is ordered to be made shall provide that such improvement shall be made by general taxation, the cost of such improvement shall be levied and collected with and as part of the general taxes of such city, but no street paving in the first instance, or the making or repairing of side-walks shall be made or ordered made, except at the expense of abutting property.

The expense of paving or otherwise improving all street intersections shall be paid out of the general funds of the city, and all cross-walks and intersections of streets and alleys, and across public grounds shall be laid and kept in repair at the expense of the city at large. After a street shall have been once graded to an established grade and improved by special assessment of

ACT NO. 66.

Session Laws of 1899.

Section 1. That Section 4 of Act No. 57 of the Nineteenth Legislative Assembly of the Territory of Arizona, entitled "An Act Adding to the powers and privileges already vested by Charter in Incorporated Cities," approved March 18, 1897, be amended by inserting the words "OR STREET GRADING" after the words "STREET PAVING" in the fifth line of said Section 4.

contiguous property, it shall be kept in repair at the expense of the city. This Section shall not, however, apply to the repair of sidewalks, which in all instances shall be repaired and renewed by the owners of abutting lots, and if not so repaired and renewed on an order made by the Common Council requiring such repair and renewal, and served upon the occupant or owner of the abutting lot, either personally or by mail, within twenty (20) days after such service, then such repairing or renewing shall be done by the city, and the ex pense thereof be and become a lien upon such abutting lot, and be placed in the next tax-roll of such city as a tax upon such property, and collected or said lot sold therefor, as other city taxes are collected or sales made for taxes.

Par. 469 R. S.

Sec. 5. When said ordinance under which said local improvement shall be ordered, shall provide that such improvement shall be made or paid for in whole or in part by special assessment,

ACT NO. 66.
Session Laws of 1899.

To Amend Act No. 57 of the Session Laws of 1897.

Sec. 2. That Section 5 of said Act be amended so as to read as follows: When

or by special taxation of contiguous property, the same shall be levied, assessed and collected in the manner provided in the sections of this Act, providing for the mode of making, levying, assessing and collecting special assessments. But no such special assessment or special tax shall exceed in amount twenty per cent of the value of the property upon which said special assessment or tax is levied, to be determined by the valuation fixed by the last assessment of said property for city taxes.

Par. 470 R. S.

Sec. 6. Whenever such local improvements are to be made wholly or in part by special assessment, the Common Council of such City shall pass an ordinance to that effect, specifying therein the nature, character, locality and description of such improvements, provided, that whenever any such ordinance shall provide only for the building, repairing or renewing of any side-walk, the owner of any lot or piece of land fronting on such side-waulk shall be allowed such ordinance under which said local improvement shall be ordered, shall provide that such improvement shall be made or paid for in whole or in part by special assessment or by special taxation of contiguous property, the same shall be levied, assessed and collected in the manner provided in the Sections of this Act, providing for the mode of making, levying, assessing and collecting special assessments.

thirty (30) days after the time at which such ordinance shall take effect in which to build or renew such side-walk opposite his land, and thereby relieve the same from assessment; provided, that the work so to be done shall in all respects conform to the requirements of such ordinance.

Par. 471 R. S.

Sec. 7. The Common Council shall appoint three (3) of its members or any three (3) competent persons, who shall make an examination of the premises to be affected and make an estimate of the cost of the improvements contemplated by such ordinance including labor, materials and all other expenses attending the same, and cost of making and levying the assessment, and shall report the same in writing to said Common Council.

Par. 472 R. S.

Sec. 8. On such report being made and approved or modified by the said Common Council, it shall be the duty of the Common Council to appoint a committee

of three (3) persons, residents of said city, one of whom shall be the Assessor of the said City, who shall examine the locality where the improvement is proposed to be made, and the lots, blocks, tracts and parcels of land that shall be benefited thereby and to estimate what proportion of the total cost of such improvement will be of benefit to the public and what proportion thereof will be of benefit to the property to be benefited, and apportion the same between the city and such property, so that each shall have its relative equitable proportion, and having found such amounts to apportion and assess such amount so found to be of benefit to the property upon the several lots, blocks, tracts and parcels of land in the proportion in which they will be severally benefited by such improvement; provided, that no lot, block or tract of land shall be assessed in a greater amount than it will be actually benefited.

Par. 473 R. S.

Sec. 9. Said committee shall also make or cause to

be made an assessment roll, in which shall appear the names of the owners, so far as known, a description of block, lot, tract or parcel of land and the amount assessed as benefits thereto, and in which shall be set down as against the city the amount they shall have found as public benefit and certify such assessment roll to the Common Council of such City by which they were appointed, within at least thirty (30) days from the date of their appointment.

It shall be the duty of such committee within five (5) days after their appointment to fix a time and place when and where they will meet to consider and decide upon such assessments, which time shall be not less than fifteen (15) nor more than twenty (20) days from the date of their appointment. They shall give notice by mail to each owner of premises to be assessed whose name and place of residence is known to them, or upon diligent inquiry can be ascertained, of the time and place of their meeting, such notice shall be mailed at least ten (10) days before such day of hearing. They

shall also cause notice to be given of such hearing by posting notices in at least four (4) public places in such city, two (2) of which shall be in the neighborhood of such improvement, and by publishing the same at least once in a newspaper published in said city.

The notice shall be substantially as follows:

Special Assessment Notice.

Notice is hereby given to all persons interested, that the Common Council of—— having ordered that (here insert nature and description of improvements substantially as in ordinance) and having appointed the undersigned a committee to examine and report upon such improvement, and to make an assessment of the costs of said improvement according to the benefits upon the property contiguous thereto, a hearing will be had by said committee of all persons interested in said improvement and the lands to be affected by a special assessment thereof at..... on the.....day..... at.....o'clock. All persons desiring may then and there

appear and make any objections they may have to such improvement and assessment

.....

.....

Committee.

All persons intterested in any real estate to be affected by such special assessment may appear and be heard before such committee, with such witnesses as they may produce.

Par. 474 R. S.

Sec. 10. If upon such hearing it shall appear that any premises assessed for said improvements in the roll prepared by such committee are assessed more or less than they will be benefited, or more or less than the proportionate share of the cost of the improvement which such premises should justly bear, the committee shall amend and change its assessment accordingly, and shall certify said roll as so corrected to the Common Council, with the testimony, if any, taken by said commitee.

Par. 475 R. S.

Sec. 11. Upon presentation of such roll and the re-

port of such committee to the Common Council,it shall proceed to examine and reject confirm or modify and confirm the assessment roll and the assessments therein contained, and thereupon if such assessments be confirmed, or modified and confirmed, the same shall stand as a valid tax and be a lien upon the several lots, blocks and pieces of land assessed therein, as other and general city taxes are, to the amount of such assessment against each lot, block or piece of land.

(In the revision of 1901 a proviso is here added that the Common Council may provide for the payment of said assessment by annual installments not to exceed ten, such installments to bear interest, etc., and such interest to be due and payable at the same time as the installments, and to be a lien on the property. And two paragraphs are also here added in the revision, numbered 476 and 477, giving power to the Mayor and Common Council to issue bonds to provide for the payment of such deferred payments, and power to appoint

a committee to sell such bonds, interest on the bonds not to be greater than that provided for in the deferred installments.)

Par. 478 R. S.

Sec. 12. If the owner of any parcel of land assessed for such improvement by special tax feels himself aggrieved by reason of the determination made by the Common Council, he may, within twenty (20) days after the date of such determination, appeal therefrom to the District Court; provided, that in case any contract shall have been made for making the improvements, said appeal shall not affect such contract; and in case the appellant shall succeed, the difference between the amount charged in the assessment roll and the amount adjudged to be paid as benefits accruing to the parcel of real estate described in such assessment roll shall be paid by the city at large.

Par. 479, R. S.

Sec. 13. The appeal given by the last Section shall

be the only remedy of the owner of any parcel of land, or of any person interested therein, affected by said improvement, for the redress of any aggrievance he may have by reason of the making of such improvement.

Par. 480, R. S.

Sec. 14. Upon the confirmation, or modification and confirmation, of such report and assessment by the Common Council, the Recorder of the city shall file the report and assessment, and record the action of the Common Council thereon. And the Mayor and Recorder shall thereupon issue a warrant for the collection of such special assessment and tax, and deliver the same, together with a copy of the assessment roll as confirmed by the Common Council, to the officer authorized to collect the general city taxes; such warrant shall direct the officer aforesaid to collect said tax as in this Act provided, and give sufficient authority to collect the assessment therein, and in such copy of said roll specified

Par. 481, R. S.

Sec. 15. The collector re-

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ceiving such warrant shall immediately give notice thereof by publishing such notice in one or more newspapers in such city, if such newspaper there be, and if no such newspaper, then by posting four copies thereof in public places along the line of the proposed improvement. Such notice shall be substantially in the following form: (Form of notice not questioned.)

Par. 482, R. S.

Sec. 16. It shall be the duty of the Collector in whose hands the warrant shall so come, as far as is practicable to call upon all persons resident within the corporation, whose names are upon the assessment roll, of the occupants of the property assessed, and personally or by written and printed notice, left at his or her usual place of abode, inform them of such assessment and request the payment of the same. Any such collector omitting so to do shall be liable to a penalty of ten dollars ($10) for every such omission, but the validity of the special assessment, or the right to apply for and

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obtain judgment for any such special assessment shall not be affected by such omission It shall be the duty of such collector to write the word "paid" opposite each tract or lot upon which the assessment is paid, together with the name and post-office address of the person making the payment and the date of payment.

Par. 483, R. S.

Sec. 17. It shall be the duty of the collector of special assessments, within such time as the Common Council may by ordinance provide, to make a report in writing to the general officer of the County authorized or to be designated by the general revenue law of this Territory to apply for judgment and sell land for taxes due the County and Territory, of all the lands, town lots and real property, upon which he shall have been unable to collect special assessments, with the amount of special assessments due and unpaid thereon, together with his warrant or a brief description of the nature of the warrant or warrants received by him authorizing

ACT NO 66.

Session Laws of 1899.

To Amend Act No. 57, Session Laws of 1897.

Sec. 3. That Section 17 of said Act be amended so as to read as follows: It shall be the duty of the collector of special assessments, within such time as the Common Council may provide, but in no event later than the 21st day of December of the year in which such assessment was made, to make a report in writing to the general officer of the County authorized by the general revenue law of this Territory to sell for taxes due the County and Territory, of all the lands, town lots and real property

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the collector thereof which report shall be accompanied with the oath of the collector that the list is a correct report and return of the lands, town lots and real property on which the special assessments levied by the authority of the City of ———— remain due and unpaid, that he is unable to collect the same, or any part thereof and that he has given the notice required by law, that said warrants had been received by him for collection.

Said report, when so made, shall be **prima facie** evidence that all of the forms and requirements of the law in relation to making said returns have been complied with, and that the special assessments mentioned in said report are due and unpaid. And upon the application for judgment upon such assessment no defense or objection shall be made or heard which might have been interposed in the proceeding for the making of such assessment or the application for the confirmation thereof.

upon which he shall have been unable to collect special assessments, with the amount of special assessments due and unpaid thereon, together with his warrant or a brief description of the nature of the warrant or warrants received by him authorizing the collection thereof; which report shall be accompanied with the oath of the collector that the list is a correct report and return of the lands, town lots and real property on which the special assessments levied by the authority of the City of ————.....—— remain due and unpaid; that he is unable to collect the same or any part thereof, and that he has given the notice required by law that said warrants had been received by him for collection. Said report when so made shall be prima facie evidence that all of the forms and requirements of the law in relation to making said returns have been complied with and that the special assessments mentioned in said report are due and unpaid. And in any action before any court, wherein the question of the validity of such assessment is an issue, no defense or objec-

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Par. 484, R. S.

Sec. 20.

Sec. 18. When said general officer shall receive the report provided for in the preceding section, he shall proceed TO OBTAIN JUDGMENT AGAINST SAID LOTS, parcels of land and property for said special assessments remaining due and unpaid at the same time and in the same manner as is or may be by law provided for obtaining judgment against lands for taxes due and unpaid the County and Territory, and shall in the same manner proceed to sell the same for the said special assessments remaining due and unpaid. IN OBTAINING SAID JUDGMENT and making said sale, the said officer shall be governed by the general revenue laws of this Territory, except when otherwise provided herein. No application for judgment against lands for unpaid special assessments tion shall be made or heard, which might have been interposed in the proceedings for the making of such assessment or the application for the confirmation thereof.

ACT NO. 66.

Session Laws 1899.

To Amend Act 57 of 1897.

Sec. 4. That Section 18 be amended so as to read as follows:

Upon the delivery of such delinquent list to the County Collector of taxes of such County, such County Collector shall deliver to said City Collector his receipt for the total amount of the special assessments so delinquent, which receipt said City Collector shall file with the City Treasurer, and the City Treasurer shall thereupon charge the amount specified in said receipt to the County Collector. Upon the receipt of said delinquent list it shall be the duty of the County Collector to incorporate said list with the County delinquent list, noting in such list what prop-

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shall be made at a time different from the annual application for judgment against lands upon which general taxes remain due and unpaid.

The application for judgment upon delinquent special assessments in each year shall include only such special assessments as shall have been returned as delinquent to the County Collector on or before the first day of April, in the year in which said application was made.

erty is delinquent for such special assessment by placing the words "City of ——— Special Assessment" at the head of a separate column containing the said City delinquent special assessment; AND HE SHALL SELL SUCH DELINQUENT CITY PROPERTY AT THE SAME TIME AND IN THE SAME MANNER, FOR SUCH CITY DELINQUENT SPECIAL ASSESSMENT, AS REAL PROPERTY IS REQUIRED TO BE SOLD BY LAW FOR COUNTY AND TERRITORIAL DELINQUENT TAXES, GIVING THE SAME NOTICE OF SALE AS IS NOW OR MAY BE REQUIRED BY LAW IN REGARD TO SALES OF REAL ESTATE FOR DELINQUENT COUNTY AND TERRITORIAL TAXES. THE COUNTY COLLECTOR MUST COLLECT IN addition TO THE TAXES DUE ON SUCH SPECIAL ASSESSMENT, SUCH PENALTIES, INTEREST AND COSTS AS ARE PROVIDED BY LAW TO BE COLLECTED ON PROP-

ERTY DELINQUENT FOR COUNTY AND TERRITORIAL TAXES.

Par. 485, R. S.

Sec. 21.

Sec. 19. After making said sales, the list of lots, parcels of land and property sold thereat shall be returned to the office of the County Recorder, and redemption may be made as provided for in the general revenue laws of this Territory.

Par. 486, R. S.

Sec. 22.

Sec. 20. If the Collector shall receive any moneys for taxes ~~or~~ and assessments giving a receipt therefor for any land or parcel of land, and afterward return as unpaid to the County and Territorial officers authorized to sell land for taxes or shall receive the same after making such return and the same be sold for tax or assessment which has been so paid and receipted for by himself or his deputy he and his bondsmen shall be liable to the holder of the certificate given to the purchaser at the

sale for double the amount of the face of the certificate, to be demanded in two years from the date of the sale and recovered in any court having jurisdiction of the account, and the city shall in no case be liable to the holder of the certificate.

Par. 487, R. S.

Sec. 23.

Sec. 21. The Collector or Collectors, and the general officer aforesaid, to whom said warrants shall be returned, shall pay over to the city to which it shall belong all moneys collected by them, respectively, upon or by virtue of said warrant, or upon any sale for taxes or otherwise, at such time or times and in such manner as shall be prescribed by ordinance, and shall be allowed such compensation for their services in the collection of such assessments as the ordinance of the city shall provide, not to exceed the amount of compensation fixed by general law for similar services.

Par. 488, R. S.

Sec. 24.

Sec. 22. The general revenue laws of this Territory in reference to proceedings TO RECOVER JUDGMENT FOR DELINQUENT TAXES, the sale of the property thereon, the execution of certificates of sale and deeds thereon, the force and effect of such sales and deeds, and all other laws in relation to the enforcement and collection of taxes and redemption of tax sales, except as herein otherwise provided, shall be applicable to proceedings to collect such special assessment.

Par. 489, R. S.

Sec. 25.

Sec. 23. Any city interested in the collection of any tax or special assessment may become a purchaser at any sale of real or personal property to enforce the collection of the same, and may, by ordinance, authorize and make it a duty of one or

ACT NO 66.

Session Laws 1899.

To Amend Act No. 57 of 1897.

Sec. 5. That Section 22 of said Act be amended so as to read as follows:

The general revenue laws of this Territory in reference to proceedings for the collection of delinquent taxes on real property, the sale thereof, the execution of certificates of sale and deeds thereon, the force and effect of such deeds and sales; and all other laws in relation to the enforcement and collection of delinquent taxes and redemption of tax sales, except as herein otherwise provided, shall be applicable to proceedings to collect such special assessments.

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more city officers to attend such sale and bid thereat in behalf of the corporation.

Par. 490, R. S.

Sec. 26.

Sec. 24. If any assessment shall be annulled by the Common Council or set aside by any court a new assessment shall be made and returned and like notice given and proceedings had as herein required in relation to the first, and all parties in interest shall have the like rights and the Common Council and Court shall perform like duties and have like powers in relation to any subsequent assessments as are hereby given in relation to the first assessment.

Par. 491, R. S.

Sec. 27.

Sec. 25. If in any case the first assessment prove insufficient a second may be made in the same manner as nearly as may be and so on, until sufficient moneys have been realized to pay for such public improvement. If too large a sum shall at any time be raised the excess shall be refunded ratable to those by whom it was paid.

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Par. 492, R. S.

Sec. 28.

Sec. 26. All persons taking any contract with the City, and who agree to be paid from special assessments, shall have no claim or lien upon the city in any event, except from the collection of the special assessments made for the work contracted.

Par. 493, R. S.

Sec. 29.

Sec. 27. All contracts for the making of any public improvement to be paid for in whole or in part by a special assessment, the expense whereof shall exceed two hundred dollars ($200.00) shall be let to the lowest responsible bidder in the manner to be prescribed by ordinance. Such contracts to be approved by the Mayor of the City, provided, however, that when the expense thereof shall not exceed two hundred dollars ($200.00) any such contract may be entered into by the proper officer without advertising for bids, and without such approval, by vote of two-thirds (2-3) of all the Councilmen elected.

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Par. 494, R. S.

Sec. 30.

Sec. 28. All special assessments levied by any city under this Act, shall from the date of assessment, be a lien upon the real estate upon which the same may be imposed, and such lien shall continue until such special assessments are paid. And the same proceedings may be resorted to by the Collector upon any warrant or order issued or made for the collection of special assessments as in the case of the collection of Territorial and County taxes under the general laws of the Territory.

Par. 495, R. S.

Sec. 31.

Sec. 29. At any time after the same becomes due, it shall and may be unlawful for any Collector thereof to commence suit in any Court of Record, in the corporate name of such City against any person or persons for the total amount of special assessment, which such persons are liable for the payment of. Such suits shall be commenced by complaint and shall state the several

ACT NO. 66.

Session Laws 1899.

To Amend Act 57 of 1897.

Sec. 6. That Section 29 of said Act be amended so as to read as follows:

Any time after the same becomes due, it shall and may be lawful for such City Collector, if so required by the Mayor and Common Council of said City, to commence suit in any Court of

amounts of the special assessments sought to be recovered, and give a general description of the warrant or warrants issued for the collection thereof; upon the filing of the complaint, a summons shall be issued, served and returned as in other suits in such courts. Upon the return of such summons duly served, the Court shall forthwith proceed to the hearing of such complaint without formal pleadings, and may render judgment for all or any part of special assessment, as the right and the justice of the case may require. The original or certified copy (by the Recorder under the corporate seal) of such warrant or warrants and list or lists, or so much thereof as refers to the special assessments sought to be recovered, shall be PRMIA FACIE evidence of the right of said collector to a judgment in favor of such corporation. Executions shall issue upon such judgment as in other cases, but such execution may be first levied upon and collected from any personal property of the defendant; or the Court in which such proceedings were had, may, Record, in the corporate name of such City against any person or persons for the total amount of special assessments for which such person or persons are liable as well as for the foreclosure of such special assessment tax lien. In such action such collector may join as defendants all persons so liable for such City assessments who have not paid the same, but no judgment can be obtained and no foreclosure had against any defendant except for the special assessment so levied against him for his particular piece of property; such action or suits shall be commenced by complaint and shall state the several amounts of the special assessments sought to be recovered, the name of the person or persons owing the same and a description of the property upon which such special assessment is a lien, and give a general description of the warrant or warrants issued for the collection thereof. Upon the filing of the complaint a summons shall be issued and served and returned as in other suits in such Courts. Upon the return of such summons duly served, the

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upon complaint of the city, issue a SCIRE FACIAS against the person or persons liable for such payment, to show cause why execution should not issue against him or them for the amount of such assessment; and if upon return of such SCIRE FACIAS good cause is not shown why execution should not issue, the Court may award execution, against such person or persons, in the usual form of execution upon judgment at law.

court shall therewith proceed to a hearing of such complaint without formal pleadings and may render formal judgment for all or any part of such special assessment against the person or persons respectively liable thereto, as the right and justice of the case may require, and may further decree a foreclosure and sale of the lands upon which such special assessment respectively are a lien, in the same manner as is now provided by law for the foreclosure and sale of liens or mortgages on real estate; and in such action said court may render personal judgment against the persons respectively liable for such special assessments; upon which judgments executions may issue as is now provided by law. The general laws of the Territory of Arizona in reference to the enforcement of judgments and executions, foreclosure sales, rights of redemption, issuance of sheriff's certificates of sale and sheriff's deed shall be applicable to the proceedings under this section, provided, however, that whenever any bonds are issued by the common council of any city, they

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must have been authorized by a vote of the people in accordance with Acts of Congress and the Laws of the Territory of Arizona.

Sec. 7. This Act shall take effect and be in force from and after its passage.

Approved March 16th, 1899.

Par. 496, R. S.

Sec. 32.

Sec. 30. Whenever any city shall apply to any court for the purpose of making just compensation for property taken or damaged by such proceedings as are authorized by this Act, and the laws of the Territory, such city may file in the same proceeding a supplemental petition praying the Court to cause an assessment to be made for the purpose of raising the amount necessary to pay the compensation and damages which may be, or shall have been awarded to the property taken or damaged, with the costs of the proceeding. The said Court shall have the power at any time after such supplemental petition shall have been filed, to appoint three (3)

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commissioners to make such assessment and to ascertain, as near as may be, the costs incurred to the time of such appointment and the probable further cost of the proceeding, including therein the estimated costs of making and collecting such assessments and shall direct such costs to be included by such commissioners in making such assessment. Like proceedings in making said assessment shall be had and the assessment shall be made, collected and enforced in the same manner, as near as may be, as is provided for in this Act in other cases.

Par. 497, R. S.

Sec. 33.

Sec. 31. Any City may levy a tax for general municipal purposes not to exceed for any one year seventy (70) cents on each one hundred dollars of taxable property in such city, provided, that nothing in this Act contained shall limit the powers now given to any incorporated city by its charter.

Sec. 32. This Act shall take effect and be in force from and after its passage.

Approved March eighteenth, 1897.

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From the foregoing transcript of Act No. 57 of the Session Laws of 1897, and Act No. 66 of the Session Laws of 1899, amending said Act No. 57, it will appear that Chapter 2 of Title 11 of the Revised Statutes of 1901 is an exact copy of said Act No. 57, as amended by said Act No. 66, with the exception of the additions thereto made by the revision, as noted on page 28 of this brief, and the omission of sub-sections 2 to 28 of Section one of said Act No. 57, both of which we omit as entirely immaterial.

And if it be admitted that Section 18 of said Act No. 57 (now Sec. 20, Par. 484, Revised Statutes), before it was amended, did EXPRESSLY AUTHORIZE the County Collector of Territorial and County taxes to bring suit for the collection of delinquent special city assessments, it is plain that the amending Act No. 66 of the Session Laws of 1899 took away that authority and confined him to the power to SELL, as provided in the last ten lines of said amending section. (See both these sections, copied on pages 34 and 35 of this brief, and the last ten lines of Paragraph 484 (Sec. 20) of the Revised Statutes of 1901.)

At the time said two acts were passed and at the time they were embodied in the Revised Statutes as Chapter 2 of Title 11, Chapter 7 of Title 62, ENTITLED "REVENUE", provided the mode of collecting delinquent Territorial and County Taxes, to-wit: By publishing a notice of the time and place of sale, of the property delinquent, for four weeks before the day of sale, etc. And we submit that was the mode in which the County Collector was given authority to sell by the said amended Section 18 (now Sec. 20 Paragraph 484, of the Revised Statutes).

And during all that time, and up to this time, and still continuing, the City had a second ample

remedy for the collection of delinquent special assessments, by Sec. 28 of said Act No. 57 (now Paragraph 494 (Sec. 30) of the Revised Statutes), in words as follows:

"494 (Sec. 30): All special assessments levied by any city under this act, shall from the date of assessment, be a lien upon the real estate upon which the same may be imposed, and such lien shall continue until such special assessments are paid. And the same proceedings may be resorted to by the collector upon any warrant or order issued or made for the collection of special assessments as in the case of the collection of territorial and county taxes under the general laws of the territory."

The City also had another remedy, full and ample, by Sec. 29 of said Act No. 57, as amended by Sec. 6 of said Act No. 66, and embodied in the Revised Statutes as Paragraph 495 (Sec. 31) and printed in full on pages 41, 42 and 43 of this brief, but none of these three remedies would justify the PENAL INTEREST, cost and fees embodied in the judgment in this case.

But thereafter, in March, 1903, the Legislature passed Act No. 92, which by no construction can be made to apply to Special Municipal Assessments, but in order to be certain that we comply with the rules of this Honorable Court, we here copy in full said act, because it is on this statute that appellee relies for the recovery of the extreme penal interest, fees and costs embodied in the judgment. (See Record, page 40.)

IV.

"No. 92 AN ACT.

To amend Chapter VII of Title LXII of the Revised Statutes of Arizona, 1901, Entitled "Collection of Delinquent Taxes".

Be it Enacted by the Legislative Assembly of the Territory of Arizona:

Section 1. That Chapter 7 of the Title 62 of the Revised Statutes of Arizona, 1901, be, and the same is hereby amended so that said Chapter shall read as follows:

Section 79. At the meeting of the County Board of Supervisors at which the several delinquent lists are required by law to be returned and certified, the said board of supervisors shall examine and compare the lists of lands and town lots on which the taxes remain due and unpaid: and if any such lands or town lots have been assessed more than once, or if said lands or town lots are not subject to taxation, or if the legal sub-division be incorrectly described, in all such cases the said board of supervisors shall correct such error by the best means in their power and cause the lists so corrected to be certified and filed in the office of the clerk of the board of supervisors and shall also cause the amount of the Territorial and County taxes to be entered on record, and the amount of the Territorial taxes to be certified to the Auditor of the Territory.

Section 80. All real estate upon which the taxes remain unpaid on the second Monday in December, annually, shall be deemed delinquent, and the tax collector shall proceed to enforce the lien of the Territory thereon, as required by this chapter, and any failure to properly return the delinquent list, as required of this chapter, shall in no way affect the validity of the assessment and levy of taxes nor of the judgment and sale by which the collection of the same may be enforced, nor in any manner to affect the lien of the Territory, nor on such delinquent real estate for the taxes unpaid thereon.

Section 81. The clerk of the Board of Supervisors shall file the said lists in his office, and within ten days thereafter make the same into a "back tax book" as contemplated by section 84 under the seal of the board of supervisors, and deliver the same to the tax collector of his county, whose duty it shall be to proceed to collect the same, and to that end shall have the power, and it is hereby made his duty, to levy upon, seize and distrain personal property, and sell the same for such taxes. And if it appears that any board of supervisors or clerk of such board of this Territory has, within five years next, before taking effect of this section, failed in the discharge of the duties prescribed by section 79 and 84 of this chapter, or shall so fail at any time hereafter, to such an extent that the collection of said taxes cannot be enforced by law, it shall be the duty of the said board of supervisors and said clerk or their successors in office, immediately after such omission or defect is discovered, to proceed at once to correct the same and supply the omission or defect and return such corrected "back tax book" to the collector, whose duty it shall be to collect the same, as hereinbefore and hereinafter set forth.

Section 82. The taxes due and unpaid on any real estate which has heretofore been returned delinquent and which has not been forfeited to the Territory, and the taxes due are unpaid on any real estate which has been forfeited to the Territory for the non-payment of such taxes, shall be deemed and held to be back taxes, and the lien heretofore created in favor of the Territory of Arizona is hereby retained on each such tract and lots of real estate to the amount of the taxes due thereon and also the interest and costs accruing under this chapter.

Section 83. Immediately after the taking effect of this chapter, the tax collector of each county

shall return to the board of supervisors of his county all delinquent and forfeited lists of tax bills, of real estate, in his hands, except taxes due prior to the year 1888, which taxes the clerk of the board of supervisors is hereby authorized to strike from the forfeited list, marking thereon all collections made, and shall at the next regular meeting of the board of supervisors make settlements for said collections.

Section 84. Within sixty days after the taking effect of this chapter, and every year thereafter, within thirty days after the settlement of the tax collector, the several clerks of the county boards of supervisors in each county in this Territory shall make in a book to be called the "back tax book" a correct list in numerical order of all tracts of land and town lots on which back taxes shall be due in such county, city or town, setting forth opposite each tract of land or town lot the name of the owner, if known, and if the owner thereof be not known, then to whom the same was last assessed, the description, supervisors of his county, all delinquent and forfeited lists of tax bills, of real estate in his hands, except taxes due prior to the year 1888, which taxes the clerk of the board of supervisors is hereby authorized to strike from the forfeited list, marking thereon all collections made, and shall at the next regular meeting of the Board of Supervisors make settlement for said collection.

Section 84. Within sixty days after taking effect of this chapter and every year thereafter within thirty days after the settlements of the tax collector the several clerks of the county boards of supervisors in each county in this Territory shall make in a book to be called the "back tax book" a correct list in numerical order of all tracts of land and town lots on which back taxes shall be due in

such county, city or town, setting forth opposite each tract of land or town lot the name of the owner, if known, and if the owner thereof be not known, then to whom the same was last assessed, the description thereof, the year or years for which such tract of land or town lot is delinquent or forfeited and the amount of the original tax due each fund on said real estate, (and the interest due on the whole of said tax, at the time of making said "back tax book," together with the clerk's fees then due) in appropriate columns arranged therefor and aggregate amount of taxes, interests and clerk's fees charged against each tract of land or town lot for all the years for which the same is delinquent or forfeited, said "back tax book" when completed shall be delivered by the said clerk to the tax collector of the county, for which he shall take duplicate receipts, one of which he shall file in his office and the other with the Auditor of the Territory, and the clerk of the Board of Supervisors shall charge such tax collector with the aggregate amount of taxes, interest and clerk's fees contained in said "back tax book," all taxes, interests and clerks' fees hereinafter contained in the "back tax book" herein described, shall bear interest from the time of making out said "back tax book" at the rate of ten per cent per annum until paid. In computing interest, under this chapter, a fraction of a month shall be counted as a whole month.

Section 85. The tax collector of the respective counties shall proceed to collect the taxes contained in such "back tax book" as herein required, and any person interested in, or the owner of any land or town lot contained in said "back tax book" may, on or before the 31st day of December, A. D. 1903, redeem such tract of land or town lot or any part thereof, from the Territory's lien thereon, by paying to the tax collector the amount of the orig-

nal taxes, as charged against such tract of lands or town lots described in said "back tax book," together with interest on the same from the first day of January, A. D. 1901, at the rate of ten per cent per annum, and the costs accruing under this chapter, provided, that if suit shall have been commenced against any person owing taxes on any tract of land or town lot contained in said "back tax book" for the collection of taxes due on the same, the person desiring to redeem any such tract of land or town lot shall in addition to the original tax and the interest, and costs accruing under this chapter, pay all necessary costs incurred in the court where the said suit is pending, together with such attorney's fees as the court may allow.

Section 86. If on the first day of January, A. D. 1904, any of said lands or town lots contained in said "back tax book" remain unredeemed it shall be the duty of the tax collector to proceed to enforce the payment of the taxes charged against such tract or lot by suit in the courts of competent jurisdiction of the county where the real estate is situated, which same court shall have jurisdiction without regard to the amount sued for, to enforce the lien of the Territory and for the purpose of prosecuting suit for taxes under this chapter the collector shall have power, with the approval of the county board of supervisors to employ such counsel as he may deem necessary, who shall receive as fees in any suit such sum, not to exceed twenty-five per cent of the amount of the tax actually collected and paid into the treasury, as may be agreed upon in writing and approved by the county board of supervisors before such services are rendered, which sum shall be taxed as costs in the suit and collected as other costs, and no such attorney shall receive any fee or compensation for such services except as in this section provided, and it shall be the duty

of the tax collector when suit shall have been commenced against any tract of land or town lot in said "back tax book" to note opposite said tract of land or town lot such fact also against whom suit has been commenced.

Section 87. All actions commenced under the provisions of this chapter, shall be prosecuted in the name of the Territory of Arizona at the relation and to the use of the tax collector, and against the owners of the property; and all lands owned by the same persons may be included in one petition and in one count thereof, for the taxes for all such years as taxes may be due thereon, and the said petition shall show the different years for which taxes are due, as well as the several kinds of taxes or funds to which they are due, with the respective amounts due to each fund, all of which shall be set forth in a tax bill of said back taxes, duly anthenticated by certificate of the tax collector and filed with the petition, and said tax bill or bills, so certified, shall be prima facie evidence that the amount claimed in said suit is just and correct, and all notices and process in suit under this chapter shall be sued out and served in the same manner as in civil actions in district courts, and in case of suit against non-residents, unknown parties, or other owners on whom service can not be had by ordinary summons, the proceedings shall be the same as now provided by law in civil actions affecting real or personal property. In all suits under this chapter, the general laws of this Territory as to practice and proceedings in civil cases shall apply, so far as applicable and not contrary to this chapter.

Section 88. The judgment, if against the defendant, shall describe the land upon which the taxes are found to be due, shall state the amount of

taxes and interest found to be due upon each tract or lot, and the year or years for which the same are due, up to the rendition thereof, and shall decree that the lien of the Territory be enforced, and that the real estate, or so much thereof as may be necessary to satisfy such judgment, interest and costs, be sold, and execution shall be issued thereon, which shall be executed as in other cases of judgment and execution, and said judgment shall be a first lien upon said land.

The clerk of the district court shall upon application of the tax collector or attorney, issue the execution herein provided for describing the real estate named in the judgment, and directed to the Sheriff, and commanding him to levy upon, advertise and sell said property, or so much therof as may be necessary to pay said judgment and subsequent costs, the same as Sheriff's might do under ordinary execution.

Section 89. The Sheriff shall execute to the purchasers of real estate, sold under this chapter, a deed for the property so sold, which shall be acknowledged before some officer authorized by law to take acknowledgments of deeds, as in ordinary cases, and which shall convey a title in fee to such purchaser of the real estate therein named and shall be conclusive evidence of title, and that the matter and things therein stated are true. In case any person shall be in possession of the real estate which may be sold as herein provided, the district court or the judges thereof out of term time, upon application, shall cause a writ of possession to be issued placing the purchaser or his assigns in possession.

Section 90. When real estate has been sold for taxes, costs or penalties by the Sheriff of any

county within the Territory of Arizona and the same sells for a greater amount than the taxes and all costs and penalties in the case, and the owner or owners, agent or agents cannot be found, it shall be the duty of the sheriff of the county, when such sale has been made or may hereafter be made, to make a written statement describing each parcel or tract of land sold by him for a greater amount than the taxes and all costs and penalties in the case, and for which no owner or owners, agent or agents can be found, together with the amount of surplus money in each case, which statement shall be subscribed and sworn to by the sheriff, making the same before some officer competent to administer oaths in this territory, and then presented to the county board of supervisors of the county where such sale has been made or may hereafter be made, and on the approval of the statement by the board of supervisors, the sheriff making the same shall pay the said surplus money into the County Treasury, take the receipt in duplicate of said Treasurer for said overplus of money, and retain one of said duplicate receipts and file the other with the county board of supervisors, and thereupon the clerk of the Board of Supervisors shall charge said Treasurer with said amount, and said Treasurer shall place said moneys to the credit of the school fund of the county, to be held in trust for the term of ten years for the owner or owners or their legal representatives. And at the end of ten years if such fund shall not be called for, then it shall become a permanent school fund of the county. County boards of supervisors shall compel owners or agents to make satisfactory proof of their claims before receiving their moneys; provided, that no county shall pay interest to the claimant of any such fund.

Section 91. Whenever it shall appear to any county board of supervisors that any tract of land

or town lot contained in said "back tax book" is not worth the amount of taxes, interest, cost and penalties due thereon, as charged in said "back tax book" or that the same would not sell for the amount of said taxes, interest, cost and penalties, it shall be lawful for said board of supervisors to compromise said taxes with the owners of said tract of land or town lot, and upon payment to the tax collector of the amount agreed upon, a certificate of redemption shall be issued under the seal of the county board of supervisors, which shall have the effect to release said lands from the lien of the Territory and all taxes due thereon as charged on said "back tax book" and in case said board of supervisors shall compromise and accept a less amount than shall appear to be due on any tract of land or town lot, as charged on said "back tax book" it shall be the duty of the said board of supervisors to order the amount so paid to be distributed to the various funds to which said taxes are due, in proportion as the amount received bears to the whole amount charged against such tract or lot, provided the county board of supervisors may order that no suit be brought on any specified tract, if, in the judgment of said Board of Supervisors such tract is not worth or will not bring the taxes, interest and costs; and provided further that the county board of supervisors of any county may direct that any tax or fund, the validity of which is being contested in the courts, may be omitted from any suits brought under this chapter, but the judgment rendered in any action where such tax is omitted shall not bar or effect any subsequent action for such tax so omitted, whenever the county board of supervisors may direct an action to be brought for such omitted tax.

Section 92. All suits instituted under the provisions of this chapter, shall be tried at the return

term of the summons, unless continued for good cause shown.

Section 93. Fees shall be allowed for services rendered under the provisions of this chapter as follows:

To the tax collector, four per cent on all sums collected, such per centum to be taxes as costs and collected from the party redeeming.

To the clerk of the county board of supervisors for making the "back tax book" twenty-five cents per tract, or town lots, to be taxed as costs and collected from the party redeeming such tract or town lots.

To the District Court clerk, sheriff, and printer such fees as are allowed by law for like services in civil cases, which shall be taxed as costs in the case provided, that in no case shall the Territory or county be liable for any such costs, nor shall the county board of supervisors or Territorial Auditor allow any claim for any costs incurred by the provisions of this chapter.

Section 94. Any party interested in any tract of land or town lot may pay the taxes, interest and costs thereon, after the commencement of suit, and before sale, by paying to the tax collector the amount of such taxes and interest, and by payment to the district court clerk of all costs thereon; and if execution has been issued the same may be paid to the sheriff, who shall forthwith pay such taxes and interest to the tax collector, and the costs to whom the same are due.

Section 95. The collector shall make diligent endeavor to collect all taxes upon said "back tax book" and whenever he finds that any taxes therein

have been paid he shall report that fact to the county board of supervisors, giving the name of the officer or person to whom such taxes were paid, and he shall also report to the board of supervisors all cases of double assessment or other errors, and thereupon the board of supervisors shall cause the necessary action to be taken and entries to be made.

Section 96. All back taxes, of whatever kind, appearing due upon delinquent real estate shall be extended in the "back tax book" made under the chapter, and collected by the tax collector under authority of this chapter.

Section 97. No action for recovery of taxes against real estate shall be commenced, had or maintained, unless action therefor shall be commenced within five years after delinquency, excepting taxes now delinquent, on which suit may be commenced at any time within five years after this chapter shall take effect, but not thereafter.

Section 98. The sheriff may appoint the tax collector, his deputy sheriff, and when so appointed, he may serve all process in suits commenced under this chapter with like effect as the sheriff himself might do.

Section 99. Hereafter as often as any delinquent tax list or tax-bills shall be received by the board of supervisors from tax collectors at their annual settlements, the same shall be made by the clerk of the board of supervisors, into a "back tax book" containing the same facts and in the same form as provided in section 84, as to the lands, city and town lots now delinquent, and said book shall be delivered to the tax collector, the tax collector shall proceed to collect the taxes due thereon, but shall not bring suit thereon for sixty days after such taxes become delinquent, but thereafter he

shall proceed with such delinquent taxes in all matters the same as provided in this chapter in reference to taxes now delinquent; all taxes hereafter becoming delinquent shall bear one per cent interest per month from the time they become delinquent until paid, and shall also be subject to the same fees, commissions and charges as in this chapter, provided for taxes now delinquent, except that for making the same into the "back tax book" the clerk who makes such book shall receive only fifteen cents per tract, city or town lot. In computing interest under this section, a fraction of a month shall be counted as a whole month.

Section 100. Nothing in this chapter shall be so construed as to prevent the institution of suit before the times herein named, provided that if it be real estate in any county of this Territory, and the owner thereof is about to remove from such county, or, being a non-resident of such county, comes within the same, so that personal service can thereby be had upon him.

Section 101. Any person hereafter putting a tax deed on record in the proper county shall be deemed to have set up such a title to the land described therein as shall enable the party claiming to own the same land to maintain an action for the recovery of the possession thereof against grantee in deed, or any person claiming under him, whether such grantee or person is in actual possession of the land or not.

Section 102. Any failure to make or complete the "back tax book" within the time required herein, or any informality in making said "back tax book" shall in no way effect the validity of the same.

Section 103. The assessment book, and all books, papers and records in the office of the clerk

of the board of supervisors appertaining to the subject of taxation, or copies thereof, duly certified by such clerk, shall be evidence in all courts in all controversies concerning the validity of the sales of lands for taxes.

Section 104. In all advertisements, notices, lists, records, certificates, deeds or other papers, required to be made by or under any of the provisions of this chapter, it shall be lawful to use letters, figures and characters as follows:

Letters may be used to denote townships, ranges, boundaries, parts of sections, parts of lots, blocks, or other subdivisions of real estate in the following manner: T. for township, R. for range, L. for lot, B. for block, N. for North, E. for East, S. for South, W. for West, or any combination or combinations of the four last-mentioned letters to denote parts of sections, lots, blocks, or other subdivisions of real property.

Figures may be used as may be requisite to state any number required whether it be township, range, survey, section, block, lot or part thereof, acres or fraction thereof, date of any kind, amount of taxes, interest or costs, or any other matter or thing which may be stated or given in figures. Characters such as ", ", of the words "do" for "ditto" or "same" may be used to denote continuation of township, range, years, tax due or other dates, and when either shall be so used shall be deemed and held to denote the same as shall stand next above in the column in which any such character or word shall be so placed, any and all decriptions of real estate made under the provisions of this chapter by the use of letters, figures and characters, as provided in this section, when so made that the land or lot may be identified and located shall be

deemed and held to be good, valid and complete, as though the same had been written out in full. Dates of valuation and narration, taxes, interest costs, acres or lots, or any fraction thereof, or any other number or amount when stated in figures' letters or characters, as herein provided, shall be deemed and held to be fully and fairly stated. as though the same had been written out in full.

Section 105. No irregularity in the assessment roll, or omission from the same, or mere irregularity of any kind in any of the proceedings, shall invalidate any such proceeding, or the title conveyed by the tax deed, nor shall any failure of any officer or officers to perform the duties assigned him or them on the day or within the time specified, work any invalidation of any such proceedings, or of such deed, and no overcharge as to a part of the taxes or costs, and payment of such taxes or costs, shall invalidate a sale for taxes, except as to a part of the real estate sold to the proportion of the whole thereof as such part of the taxes and costs is to the whole amount for which land was sold. Acts of officers de facto shall be valid as if they were officers de jure, and if a deed would be valid, as to the sale for any one tax, it shall not be impaired by any irregularity, error in the proceedings or sale for any other tax or taxes.

Section 2. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

Eugene S. Ives, President of the Council. Theodore T. Powers, Speaker of the House.

Approved March 19th, 1903.

Alexander O. Brodie, Governor.

This statute plainly expresses its object, and does not contain one word that can, by any reasonable construction, be made to apply to the collection of Special Municipal Assessments; and yet, in this case, the extraordinary Penal and Confiscatory provisions of this Act are herein applied, and judgment is given for 12 per cent per annum of the assessment, and 25 per cent on the whole thereof for counsel fees, and 4 per cent for collector's fees, besides ordinary costs. Appellee contends, and his contention is sustained by the Courts, that Paragraph 488 (Sec. 24) of the Revised Statutes of 1901, authorizes the relator, John W. Bogan, Tax Collector of Pima County, to bring this suit in the name of the Territory of Arizona, thus ignoring the fact that the original of that Paragraph, Section 22 of Act No. 57 of the Session Laws of 1897 contained the words: "TO RECOVER JUDGMENT FOR DELINQUENT TAXES", and that the amending act No. 66 of the Session Laws of 1899, Sec. 5, left out these words, and left it as it now reads in said paragraph 488 (See page 38 of this brief); and also ignoring the fact that Section 18 of the original Act. No. 57 of 1897 contained the words: "HE SHALL PROCEED TO OBTAIN JUDGMENT AGAINST SAID LOTS", and also contained the words farther on: "IN OBTAINING SAID JUDGMENT", and that the amending act No. 66 of 1899, by Section 4, amended said Section 18, and left out all these words quoted, leaving that section as it now reads in Paragraph 484 of the Revised Statutes of 1901, and thereby plainly expressing the legislative intent to take away the authority attempted to be given to the County Collector to sue for such special municipal assessment. (See the said paragraph and the amending section set out on page 34 of this brief, and to confine him to the power TO SELL as provided in the last sentence of said amending

section on pages 34 and 35 of this brief.)

We respectfully submit that to thus IGNORE the amending act is not CONSTRUCTION OF THE STATUTES but is JUDICIAL LEGISLATION and contrary to the expressed legislative intent. After diligent search of the books at our disposal, we cannot cite any cases, nor any dicta of Court, or text writers that would help this Honorable Court in deciding this case, and we think the reason of that is that no such perversion of the statutes for the purpose of the confiscation of property has hitherto been attempted.

To illustrate: The assessing committee assessed the property of appellants (Lot 5, Block 197) at $75.00 per front foot on Maiden Lane Street, double the amount at which that committee assessed the property on the opposite side (south side of Congress Street), and the reason given for that was that appellants would get a part of said Maiden Lane and a small strip of the block (206) which was removed. (See proceedings of the committee, pages 2 and 3 of the statement of the case, and pages 88 and 89 of the record.)

And neither that committee nor the City of Tucson could give any title to said street or strip, because by the petition of adjoining and fronting owners and by the ordinance No. 168, page 1, of the statement herein and Record page 109, Block 206 was removed to widen Congress Street to and including Maiden Lane, and the judgment of the District Court condemned said Block 206 FOR AN EASEMENT TO WIDEN CONGRESS STREET, etc., page 2 of statement herein, and if said City could give title to said street and strip, it could not compel appellants to take it at such an enormous price.

But, as heretofore stated, it may be that appellants are estopped to question this assessment by reason of the failure to appeal from the confirmation thereof, as provided by Sections 12 and 13 of the original act No. 57 of 1897 (now Paragraphs 478 and 479 Revised Statutes) copied in full on page 28 of this brief, and we will therefore avoid incumbering this brief by any further contention about that assessment and proceed to discuss what we consider the vital point in this, to-wit:

"That the Findings of Fact do not sustain the Judgment."

Because if the justice of the assessment is taken for granted, then the STATEMENT OF FACTS (Record page 127 and following) clearly states a cause of action against appellants in favor of the City of Tucson, IN WHICH NEITHER THE RELATOR, NOR THE TERRITORY OF ARIZONA, NOR THE COUNTY OF PIMA had any interest whatever; and RELATOR, John W. Bogan, was NOT authorized by any law of Arizona to use the name of said Territory to collect a debt due to the said City of Tucson.

And the said City had and still has, ample remedy for the collection of the debt, by Paragraph 494 (Section 30) and Paragraph 495 (Section 31), Chapter 2 of Title 11 of the Revised Statutes of 1901, as amended by Act No. 66 of the Session Laws of 1899, copied in full on pages 41 to 44 of this brief; and besides the City of Tucson, at the relation of its own tax collector, had on April 9th, 1904, and nearly one year before this action was commenced, brought its action against appellants for the collection of the same special assessments, (see defendants' PLEA IN ABATEMENT, Record page 18, and the certificate of the Clerk of

that Court, marked Exhibit A, Record pages 124-125), which action was kept pending by the City Attorney, John B. Wright, who is also one of the counsel for appellee in this case.

And under either of these paragraphs the City could without doubt, recover, and still can recover, not only the assessment, but also interest at the rate of seven per cent per annum, the interest on the bonds issued by the City by virtue of Paragraphs 476-477, Chapter 2, Title 11, of the same Revised Statutes, and as shown by plaintiff's Exhibit B. (Ordinance No. 181, Record pages 9-10-11.)

Therefore the bringing of this action by the relator, in the name of the Territory was neither necessary nor proper, nor was it authorized by the words, nor by the reasonable construction of the words of any statute, and was contrary to the plainly expressed intention of the Legislature in amending the Act of 1897; because if the Legislature, by leaving out from Sections 18 and 22 of the original Act No. 57 of 1897 the words: "HE SHALL PROCEED TO OBTAIN JUDGMENT AGAINST SAID LOTS" and the words: "IN OBTAINING SAID JUDGMENT" and the words: "TO RECOVER JUDGMENT FOR DELINQUENT TAXES", did not intend to take away the authority of the County Tax Collector to sue for special city assessments, then the amendments had no meaning at all, and were entirely useless. (See these sections and their amendments on pages 34, 35, 36, 37 and 38 of this brief.)

And the legislative intent was further expressed by amending Sec. 29 (now Sec. 31, Paragraph 495) to make it read as it now appears in said Paragraph 495, Chapter 2 of Title 11 of the Revised Statutes of 1901, thereby giving the City

a more ample remedy in addition to that given by the prior Paragraph 494 (Sec. 30).

But if the appellee, John W. Bogan, as County Tax Collector of Pima County, had no interest in the collection of the municipal special assessment for $12,533.75 due to the City of Tucson, he now (not officially, but personally) certainly has an intreest and a very substantial interest in the question of the affirmance of this judgment, thus:

Before this case can be decided and record returned to the Supreme Court of Arizona and from there to the trial court, it will be at least four years and a half, and the interest at 12 per cent per annum will amount to more than $6768.00, total $19,-301.00, and on that amount the relator recovers for himself and his counsel 25 per cent, $4825.00, and 4 per cent collector's fee, $772.00, a grand total of $24,900.00, almost double the amount of the original assessment, of which the relator gets $5,597.00, and if the property does not sell for that amount, which we think it will not, then the relator can make the balance by execution against the sureties on the STAY BOND FILED IN THE TRIAL COURT FOR $4,000.00.

And the relator has a still further interest in this judgment because if the judgment is sustained he cannot, under any law, be compelled to pay to the City of Tucson more than the original assessment, $12,533.75, and 7 per cent per annum interest thereon for four and one half years, and the difference between that and 12 per cent per annum is $2,802.00, making a total of $8,399.00. Oh, yes ! the relator has an interest in this judgment.

And under the statutes as hereinbefore quoted, the only authority for the relator to bring this suit

is set out in Finding of Fact No. VIII, Record pages 38 and 39.

In conclusion, we submit that it is plain that this suit was not brought in GOOD FAITH to collect the special municipal assessment, but to gain for the relator unlawful and unreasonable fees and perquisites and thereby entirely confiscate the property of the appellants.

And the result is sought to be reached by the application of a HIGHLY PENAL STATUTE to a case not within its words nor within its purview; for it is plain that Act No. 92 of the Session Laws of 1903, enacted long after the enactment of the two acts of 1897 and 1899, and after the embodiment of these acts in CHAPTER 2, TITLE 11, OF THE REVISED STATUTES OF 1901, could not have been in the mind of the law makers at the time these acts and the revision thereof were enacted, and if the Legislature of 1903 intended said Act No. 92 to apply to Municipal Special Assessments, that legislatrue could and would have found adequate words to express that meaning.

And COURTS never do allow A JUDGMENT for extraordinary interest, costs and counsel fees, except in cases expressly authorized by statute.

Wherefore, we respectfully pray this Honorable Court for a judgment, reversing the judgment of the trial court in this case and directing the trial court to enter a judgment dismissing the action at the cost of the relator, John W. Bogan, because the Territory, whose name he has unlawfully used, can not be made to pay the costs; leaving the City of Tucson the assessment with seven per cent per an-

num, as fully authorized by the statutes as hereinbefore cited.

Respectfully submitted,

JAMES REILLY,
A. C. BAKER·
Attorney for Appellants.

HON. MARCUS A. SMITH,
Of Counsel.

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Office Supreme Court, U. S.
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JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 180.

ALLEN E. ENGLISH AND HONORA ENGLISH, HIS WIFE, APPELLANTS,

vs.

THE TERRITORY OF ARIZONA AT THE RELATION AND TO THE USE OF JOHN W. BOGAN, TREASURER AND EX OFFICIO TAX COLLECTOR IN AND FOR THE COUNTY OF PIMA, IN THE TERRITORY OF ARIZONA.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

MARCUS A. SMITH,
Of Counsel for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES.

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SUPPLEMENTAL BRIEF FOR APPELLANTS.

The substantial injury suffered by appellants appears plainly stated at pages 66-67 of the Main Brief. Shortly stated, it is that whereas, under *then* existing law, their property was assessed for benefits in the sum of $12,533.75, and on default in making the first of five annual instalments thereof, which default occurred thirty days after February 15, 1904 (Main Brief, p. 7), the whole assessment became due and was subject to collection, and whereas suit was immediately upon such default and on April 9, 1904, brought against them by the tax collector of Pima county in the name of the city of Tucson to recover such assessment of

$12,533.75, that action was ignored and a *new* action brought in the name of the Territory to the use of the treasurer and *ex officio* tax collector of Pima county, whereunder judgment has been rendered for such assessment, with interest at *twelve* per centum per annum, *with addition of twenty-five per cent counsel fees and four per cent collector's fees,* making a grand total of nearly $25,000, or almost double the amount of the original assessment.

Among other defenses, it is urged:

1. Another prior action pending for the same assessment and undetermined, and

2. That the act under which the second action was brought, with its added penalty of 12 per cent interest and an allowance of 25 per cent counsel fees, etc., was *not* applicable to this assessment.

I.

THE PRIOR ACTION.

This was plead (R., p. 18), overruled (R., p. 60), and assigned for error (Assignment I, Main Brief, p. 12).

The prior action standing not dismissed clearly constituted a good plea in abatement of the present suit. Dismissal of the prior action would, of course, have eliminated such defense, but it is submitted that the municipality having brought appellants into court in such former action could not sue again for the same principal demand leaving the prior action still in force. The rule as between individuals is and must be the same in respect of this municipality. For it is settled that when even the sovereign enters the courts against the individual, equality of right and obligation obtains in respect of matters, both of substance and form, which bind and affect individual suitors.

United States v. Flint, 4 *Sawyer,* pp. 42, 58.

II.

The Revision of 1901, Laws of Arizona (Main Brief, p. 28), contains the distinct provision authorizing the common council of a municipality to provide for the payment of special assessments of this character by annual instalments at prescribed interest and to issue on basis thereof municipal bonds bearing no greater rate of interest. *In this case* the common council did determine and impose the assessment, payable in such annual instalments, bearing 7 per cent interest, and authorized the issue of city bonds for $30,000 at like rate of interest (R., pp. 9-13) to meet the cost of the improvement. When the entire assessment fell due, on default of payment of the first instalment the debt of the property to the municipality was hence the principal sum, with interest at 7 per centum per annum.

There is hence error in the statement of the opinion below (R., p. 115) that "the assessment became delinquent on December 21, 1904." *Contra,* by the very terms of the assessment it became delinquent thirty days after February 15, 1904, and suit was promptly commenced by the municipality in April, 1904, to enforce collection of the whole assessment.

But the Supreme Court below holds the act of 1903 superseded all former laws and methods for collection of delinquent special assessments. That entire act is printed upon the Main Brief, pp. 47-61. Supplementing the argument which follows thereon, we submit:

A.

Careful reading of the act of 1903 shows the act covers the annual tax assessed against real estate. Thus section 84 (Main Brief, p. 51) provides for the making by the clerks of the several "county boards of supervisors in each county" of a "back-tax book," which shall contain, *inter alia,* "the

description thereof, the *year or years* for which such tract of land or town lot is delinquent." And section 87 (p. 53) provides that in suits brought to collect such delinquent taxes the petition "shall show the *different years* for which taxes are due, as well as the several kinds of taxes or funds to which they are due, with the respective amounts due each fund, all of which shall be set forth in a tax bill of said back taxes, duly authenticated by certificate of the tax collector filed with the petition."

Inspection of the "tax bill" attached to the petition in this case does not disclose the full statement thus required, nor does it give the year for which the tax was claimed as delinquent.

B.

The practical interpretation given the laws of Arizona by the tax-collecting authorities demonstrates their understanding that the law as embodied in the Revision of 1901 controlled in this case, for action was brought thereunder to collect this special-assessment tax, and was still pending when the present suit was brought. That former action sought to recover the amount of the tax as principal and the interest thereon. The present action seeks far more, to wit, an attorney's fee of 25 per cent and collector's fee of 4 per cent additional, while increasing the interest demand to 12 per cent per annum. The appellants are therefore compelled in an action but now of about four years' duration to pay in interest, attorney's fees, and to the collector an amount substantially equal to the original assessment, whereas, assuming judgment in the former action against them, the recovery would be less by something over $5,000. All questions affecting the validity of the assessment were open for determination in the former action, but the opportunity to be mulcted for an attorney's fee of 25 per cent increased interest and collector's commission was apparently lacking. Hence this suit with resulting confiscation. Fur-

ther comment is unnecessary. Certainly, and under such circumstances, when summoned into court upon the same cause of action involved in the former suit its pendency should be a bar to this proceeding. As certainly the plaintiff (the taxing power by whatever name) should not be permitted to challenge its own conduct, nor be permitted to prosecute this action for the private gain of individuals, when its former action remains of record and its demand in *that* action is still existing.

Respectfully submitted,

MARCUS A. SMITH,
Of Counsel for Appellants.